UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

AURORA REGINO,

Plaintiff,

v.

KELLY STALEY, ET AL.,

Defendants.

No. 2:23-cv-00032-JAM-DMC

ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Aurora Regino ("Plaintiff") seeks a preliminary injunction against Chico Unified School District Superintendent Kelly Staley and school board members Caitlin Dalby, Rebecca Konkin, Tom Lando, Eileen Robinson, and Matt Tennis ("Defendants") in their official capacities. Plaintiff asks this Court to enjoin enforcement of school district regulation AR 5145.3, which broadly covers nondiscrimination and harassment as it applies to the school district's transgender students. See Mot. for Preliminary Injunction ("MPI"), ECF No. 18. Defendants oppose the motion. See Opp'n, ECF No. 21. Plaintiff replied. See Reply, ECF No. 27.

For the reasons set forth below, the Court DENIES

Plaintiff's motion.

I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

Plaintiff contends that the Chico United School District, in which both of her children, A.S. and C.S., are students, operates a policy, AR 5145.3 (the "Regulation"), that (1) permits school personnel to socially transition students expressing a transgender identity and (2) prohibits school personnel from informing a student's parents of this change unless the student expressly authorizes them to do so. MPI at 5-6. During the 2021-22 school year, Plaintiff's child, A.S., then a student at Sierra View Elementary School, expressed feelings of gender dysphoria to her school counselor, Mandi Robinson, specifically that she identified as a boy. Id. at 6. After a couple of subsequent counseling sessions, Plaintiff alleges that A.S.'s counselor began socially transitioning A.S. by informing her teachers that she was to be called by her new name and referred to by male pronouns. Id. at 7. School personnel did not disclose these developments to Plaintiff; Plaintiff further alleges that Robinson actively discouraged A.S. from informing Plaintiff and instead advised her to disclose her new identity to other family members first. Id. Robinson also did not suggest that A.S. discuss her gender dysphoria with a medical professional. Id. On April 8, 2022, A.S. informed her grandmother of her new gender identity, who then informed Plaintiff the same day. Id. Plaintiff then spent the following months in contact with school district personnel to express her concerns about the Regulation and advocated for the school district to change it. Id. at 8. Plaintiff alleges that

district personnel, including Defendants, dismissed her concerns and stated that state law mandated the Regulation. Id. at 8. A.S. currently does not express feelings of gender dysphoria and now identifies as a girl again and is currently in counseling for depression and anxiety. Id.

On January 6, 2023, Plaintiff filed her complaint against Defendants alleging four causes of action under 42 U.S.C. § 1983: two facial challenges to the Regulation under substantive and procedural due process; and two as-applied challenges to the Regulation under substantive and procedural due process. See Compl. A couple of weeks later, Plaintiff filed the operative motion for preliminary injunction seeking to enjoin Defendants and all district employees from: (1) socially transitioning current students without obtaining informed consent from the students' parents or guardians; (2) not obtaining informed consent from the parents or guardians of all current students who have previously been socially transitioned or are currently being socially transitioned; (3) socially transitioning Plaintiff's children without her informed consent; and (4) not obtaining Plaintiff's informed consent if her daughters have been socially transitioned in the past or are still being socially transitioned. See MPI.

II. EVIDENTIARY ISSUES

A. Judicial Notice

Defendants request the Court take judicial notice of three exhibits. See Request for Judicial Notice, ECF No. 21. Exhibit A is a publication by the California Department of Education outlining the frequently asked questions regarding California's

School Success and Opportunity Act (AB 1266), Exhibit B is a publication by the California School Boards Association detailing a sample anti-harassment regulation, and Exhibit C is Chico Unified School District's Administrative Regulation 5145.3 on antidiscrimination and harassment. Id. at 2. All three exhibits constitute government records and are, therefore, proper subjects for judicial notice. Anderson v. Holder, 673 F.3d 1089, 1094 n. 1 (9th Cir. 2012); Daniels-Hall v. National Educ. Ass'n., 629 F.3d 992, 998 (9th Cir. 2010).

B. Expert Affidavit

Defendants object to Plaintiff's submission of Dr. Stephen B. Levine's affidavit in consideration of her motion for preliminary injunction. See Defendants' Objections to Expert Affidavit, ECF No. 21. Plaintiff responds that Dr. Levin's affidavit qualifies as an expert affidavit under Federal Rule of Evidence (FRE) 702 and that Defendants' objection is premature. See Plaintiff's Response to Defendants' Objections to Expert Affidavit, ECF No. 27. The Court agrees that the affidavit is admissible under FRE 702.

III. OPINION

A. Legal Standard

A preliminary injunction is an "extraordinary remedy" that a court may award only "upon a clear showing that the petitioner is entitled to such relief." Winter v. Natural Resources Defense Counsel, Inc., 555 U.S. 7, 22 (2008). To obtain a preliminary injunction, a petitioner must demonstrate that: (1) they will likely succeed on the merits, (2) they will suffer irreparable

harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. Boardman v. Pacific Seafood Group, 822 F.3d 1011, 1020 (9th Cir. 2016) (quoting Winter, 555 U.S. at 20).

Post-Winter, the Ninth Circuit kept a "sliding scale approach" to preliminary injunctions known as the "serious questions test." Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011). Under this approach, a "likelihood" of success is not an absolute requirement. Id. at 1132. "Rather, serious questions going to the merits and a hardship balance that tips sharply toward the [petitioner] can support issuance of an injunction, assuming the other two elements of the Winter test are also met." Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1073, 1085 (9th Cir. 2014).

B. Analysis

1. Motion for Preliminary Injunction

a. Factor One: Success on the Merits

Plaintiff argues that she is highly likely to succeed on the merits of her claims because AR 5145.3 violates her substantive due process rights as a parent to A.S. as well as her procedural due process rights. Plaintiff claims that she has a constitutional right to direct the upbringing and education of her children, citing the Supreme Court findings in Parham v. J.R., 442 U.S. 584, 602 (1979) that "parents possess what a child lacks in maturity, experience and capacity for judgement" and the "natural bonds of affection lead parents to act in the best interests of their children." MPI at 9. Plaintiff claims that parental authority extends to decisions regarding the health,

well-being, and medical treatment of their children; while some parents do not act in the best interest of their children in these areas, Plaintiff argues that it would be unfair for Defendants to completely supersede all parents' authority with respect to handling gender dysphoria and expression in their children. Id. at 10. Plaintiff acknowledges that parents do not have a right to dictate the curriculum that is taught to their children in schools but argues that general school policies are subject to judicial review and cannot supersede parental rights. Id. at 10-11.

Plaintiff identifies four ways in which the Regulation violates her substantive parental rights: (1) it interferes with her right to control the important decisions in her children's lives; (2) it interferes with her right to control the health, well-being, and medical treatment of her children; (3) it facilitates students being provided substandard and unethical medical care; and (4) it goes against the presumptions of parental fitness and affection. Id. at 11-15. Plaintiff further claims that the Regulation does not satisfy strict scrutiny because Defendants cannot demonstrate that student privacy or anti-transgender discrimination are compelling government interests; additionally, the Regulation does not require school personnel to have evidence of parental abuse against a student's transgender identity, so parents are denied information based solely on a student's opinion and not on whether disclosure actually poses a risk to the student's safety. Id. at 15-16. The Regulation also lacks a lower age limit, so children as young as five years old could be subjected to social transitioning

without parental knowledge or consent, which Plaintiff argues does not conform with narrow tailoring under strict scrutiny. Id. at 17.

Plaintiff also argues that the Policy is procedurally defective because it interferes with parental rights without requiring the state to conduct a thorough investigation, provide notice to parents, or give parents the opportunity to be heard. Id.

As for Plaintiff's substantive due process claims, Defendants argue that students have a privacy right concerning their personal sexual information and that Plaintiff has no legally cognizable right that has been violated; Plaintiff is simply attempting to dictate whether her child and other children are allowed to express their preferred gender identities at school. Opp'n at 14, 19. Defendants refer to a recent district court decision out of Maryland that found that minor students have a privacy right to maintain their gender identity a secret from their parents. Id. at 14-15 (citing John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 2022 U.S. Dist. LEXIS 149021 (D. Md. Aug. 18, 2022)). Defendants distinguish the cases cited by Plaintiff, stating that they mainly cover abortion, involuntary separations, or government institutions forcing medically invasive procedures onto minors without parental consent; Defendants argue that none of them are applicable to the circumstances of the instant case. Id. at 15-17. Defendants then contend that the instant case is analogous to cases concerning the lack of parental rights regarding the direction of a child's curriculum at school, arguing that Plaintiff cannot

contest the Regulation because she decided to send her children to schools in the district, so she is subject to the district's regulations. Id. 18-19. Defendants also argue that Plaintiff cannot establish that Defendants have committed any conduct that "shocks the conscience" of the Court because the Regulation complies with state law. Id. at 19.

As for Plaintiff's procedural due process claims, Defendants again argue that Plaintiff has no cognizable right that has been violated by Defendants. Id. at 19-20. Therefore, these claims must fail as well. Id.

The Court finds that Plaintiff has failed to demonstrate a likelihood of success on the merits for her claims. The Court first finds that a determination on Plaintiff's as-applied challenges to the Regulation are premature absent more concrete factual allegations and, thus, cannot satisfy the first Winter factor. As for Plaintiff's facial challenges, to establish a substantive due process claim under § 1983, a plaintiff must allege that (1) a federal constitutional right was violated and (2) the alleged violation was committed by a person acting under the color of state law. Long v. Cnty. of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006). To establish a procedural due process claim, a plaintiff must allege that (1) they were deprived of a federal constitutional right and (2) they were denied adequate procedural protections. Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist., 149 F.3d 971, 982 (9th Cir. 1998). The Supreme Court requires a "careful description of the asserted liberty interest" that has been violated. Washington v. Glucksberg, 521 U.S. 702, 720, 117 S. Ct. 2258, 2268, 138 L. Ed.

2d 772 (1997). In the instant case, Plaintiff has failed to provide any controlling authority to suggest that the established right of parents to direct the upbringing of their children extends to the circumstances of this case. While the cases cited by Plaintiff refer to the generally held presumptions that parents act in the best interest of children and help compensate for their children's lack of maturity and experience when dealing with intimate and health related decisions, as noted above, Plaintiff's cases are restricted to abortion, commitments to mental institutions, involuntary separation by the state, and forced, physically invasive testing by the state on children without parental consent. None of the cases cited by Plaintiff opine on whether the state has an affirmative duty to inform parents of their child's transgender identity nor whether the state must obtain parental consent before socially transitioning a transgender child. In the absence of the requisite legal and statutory support for Plaintiff's contention that she has a constitutional right that was violated, Plaintiff cannot establish a likelihood of success on the merits for her facial substantive or procedural due process claims.

However, the Court notes the novel nature of Plaintiff's claims and finds that Plaintiff has raised serious questions that go to the merits of her case, namely what the bounds of the parental right are to direct the upbringing of one's children as they pertain to a child's gender identity and expression in school. In fact, Plaintiff's argument in this case has implications beyond gender identity and expression and can be applied to any personal aspect of a child's expression in school

that a parent deems relevant to their health and well-being; thus, sexual orientation, the expression of one's racial, ethnic, or cultural identity, and other topics subject to school policies could be subject to legal scrutiny under Plaintiff's theory. In light of these serious questions, the Court will continue its analysis of the remaining Winter factors with particular consideration of whether the balance of equities tips sharply in favor of Plaintiff, pursuant to Drakes Bay. 747 F.3d at 1085.

b. Factor Two: Irreparable Harm

Plaintiff argues that she has made a strong showing that the Regulation violates her fundamental constitutional rights, which is sufficient to establish irreparable injury. MPI at 19; Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012) (citing Elrod v. Burns, 427 U.S. 347, 373 (1976)). Plaintiff claims in her reply brief that (1) any delay in her filing for her preliminary injunction is negligible, (2) she is currently experiencing emotional distress arising from her concern that the school district will transition her children again without her consent, and (3) she has demonstrated that there is a substantial risk that the school district will apply the Regulation against her children in the future, all of which also constitute irreparable harm. Reply at 7-9.

Defendants first argue that Plaintiff cannot establish that there is a need for speedy action to protect her rights because she waited nine months to seek injunctive relief after learning of the Regulation being applied to her daughter A.S. Opp'n at 20. Defendants also note that A.S. has returned to identifying as a girl despite the continuance of the Regulation so there can

be no clear showing of a likelihood of irreparable harm. Id. at 20-21. Defendants also contend that Plaintiff has failed to establish an immediate threat; it is not enough that A.S. has been harmed in the past or that Plaintiff's daughters continue to reside in the school district for Plaintiff to meet her burden of showing that injury is likely and immediate. Id. at 21-22.

The Court find's Defendants' argument persuasive. A party "may not obtain a preliminary injunction unless they can show that irreparable harm is likely to result in the absence of the injunction." Cottrell, 632 F. 3d, 1135. "Indeed, suffering irreparable harm prior to a determination of the merits is perhaps the single most important prerequisite for the issuance of a preliminary injunction." See Nutrition Distribution LLC v. Lecheek Nutrition, Inc., No. CV 15-1322-MWF (MRWx), 2015 WL 12659907 (C.D. Cal. June 5, 2015) (internal citations omitted). A party requesting a preliminary injunction must "generally show reasonable diligence." Benisek v. Lamone, 201 L. Ed. 2d 398, 138 S. Ct. 1942, 1944 (2018). A delay in seeking an injunction is weighed against the moving party because an injunction is "sought upon the theory that there is an urgent need for speedy action to protect the [party's] rights." Lydo Enterprises, Inc. v. City of Las Vegas, 745 F.2d 1211, 1213 (9th Cir. 1984); see also Oakland Trib., Inc. v. Chron. Pub. Co., 762 F.2d 1374, 1377 (9th Cir. 1985) (stating that a "long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm"). The Court notes Plaintiff's nine-month delay in seeking injunctive relief and finds that Plaintiff has demonstrated a lack of urgency for action by the Court. The Court also finds that

Plaintiff is seeking to enjoin the school district to actively seek the informed consent of parents to socially transition their children who express a transgender identity. Thus, Plaintiff seeks a mandatory injunction, which goes beyond a prohibitory injunction's maintenance of the status quo and instead compels the district to take affirmative action. Doe v. Snyder, 28 F.4th 103, 111 (9th Cir. 2022). The standard for a mandatory injunction is high; it will not be granted unless extreme or very serious damage will result and is "not issued in doubtful cases or where the injury complained of is capable of compensation in damages." Id. Plaintiff has not established a clear violation of her constitutional rights, so she is not entitled to the Court's favor under this factor absent a showing that extreme or very serious harm is certain to result absent the injunction. Plaintiff has failed to do so in this case. Plaintiff's general claims of emotional distress and fear that the district will apply the Regulation against her children are vague and do not rise to the level of certain "extreme or very serious" harm that is required for the imposition of a mandatory injunction. To the contrary, Plaintiff has not demonstrated that there is any immediate, irreparable harm that requires judicial intervention at this time.

c. Factor Three: Balance of the Equities

Plaintiff argues that, in cases involving the deprivation of constitutional rights, the balance of equities favors the plaintiff unless the government can demonstrate that the injunction will seriously hamper significant governmental interests, which Defendants cannot do in this case. MPI at 19.

Plaintiff also contends that there is no burden on the school district to comply with her proposed order because schools would still be permitted to socially transition students so long as they obtain parental consent. Id. at 19-20.

Defendants respond that the balance of equities favors the school district because an injunction would force the district to abandon enforcement of its established regulation and jeopardize the privacy rights of its students. Opp'n at 22. On the other hand, Plaintiff has no applicable constitutional right that has been violated and any burden that Plaintiff feels about not being aware of her daughter's gender identity is not due to the school district, but due to A.S.'s own decision on whether to disclose it to Plaintiff. Id.

In exercising sound discretion, the Court "must balance the competing claims of injury and consider the effect of granting or withholding the requested relief," paying "particular regard for the public consequences in employing the extraordinary remedy of injunction." Winter, 555 U.S. at 24. The Court finds that Defendants have demonstrated that the balance of equities favors them, noting the burden on the school district to disrupt the status quo and change its established regulation as well as the potential burden on students who are currently benefiting from the Regulation's protections. Plaintiff has also failed to make a showing that the balance of equities tips sharply in her favor, as required under the serious questions test under Drakes Bay, considering Plaintiff's failure to establish a likelihood of success on the merits. 747 F.3d at 1085.

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d. Factor Four: Public Interest

Plaintiff argues that it is always in the public interest to prevent the violation of a party's constitutional rights; in this instance, Plaintiff has made a strong showing that the Regulation violates her parental rights, so it is in the public interest to grant her injunctive relief. MPI at 20. Plaintiff also claims that the injunction will benefit all children and parents in the district by protecting the intimate trust of the parent-child relationship and reducing the psychological harm to children who express different gender identities at home and school. Id.

Defendants argue that there is no public interest to promote when parents seek to gain unfettered access to information about their child's gender identity, regardless of the wishes of the student, nor is there a public interest in a parent forcing their own beliefs on gender on their child against their will. Opp'n at 23. To the contrary, there is an interest in creating a zone of protection at schools in the rare circumstances where the disclosure of a child's gender expression at school could lead to harm from within their family. Id.

Considering the Court's disposition on the other Winter factors, it is not swayed one way or the other regarding the public interest. Both parties raise valid concerns. It is not necessarily a school's duty to act as an impenetrable barrier between student and parent on intimate, complex topics like gender expression and sexuality, particularly when students can be as young as five years old. On the other hand, granting parents unimpeded access to and control over a student's personal life can result in conflict that makes students feel vulnerable

and unsafe both at home and at school, depending on their parents' personal beliefs. There are also practical concerns about the enforceability of anti-harassment policies like the Regulation, particularly in cases where a school could be prevented from providing institutional support and protection for certain marginalized identities because of parents' personal beliefs. However, these concerns are not dispositive in this case and are better suited for deliberation by the legislature.

IV. ORDER

For the reasons set forth above, the Court DENIES Plaintiff's motion for preliminary injunction.

IT IS SO ORDERED.

Dated: March 8, 2023

JOHN A. MENDEZ,
SENIOR UNITED STATES DISTRICT JUDGE